IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-1284

HARTSELL GRAY, County Treasurer of Harris County, Texas (HENRY E. KRIEGEL, Successor in Office),
Petitioner

v.

GARY JOHN VAN OOTEGHEM,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The Respondent, GARY JOHN VAN OOTEGHEM, respectfully requests that this Court deny the Petition for Writ of Certiorari invoked pursuant to 28 U.S.C. § 1254(1), seeking review of the Fifth Circuit's opinion in this case. That opinion, styled *Gary John Van Ooteghem v. Hartsell Gray,* Individually and in his official capacity as

Treasurer of Harris County, Texas, (Henry E. Kriegel, Successor in office), No. 78-3711 and decided on October 22, 1980, is reported at 628 F.2d 488.

REASONS WHY WRIT SHOULD BE DENIED

Petitioner advances two reasons why he believes the Writ of Certiorari should be granted in the cause *sub judice*. He does not, however, assert a conflict between the decision below and that rendered by this Court or any other federal or state tribunal. Rather, the first involves no more than a request that this Court review the findings of facts concurred in by both the District Court and the Circuit Court. The second raises no substantive issue which has not been precluded by the prior decisions of this Court.

I.

RELITIGATION OF FACT ISSUES

(A) Petitioner Seeks Review of "Concurrent Findings of Facts"

As long ago as 1923 this Court defined the factors which make up its discretionary assumption of jurisdiction as excluding review of errors in the findings of fact of the lower courts. *Magnum Comp. v. Coty*, 262 U.S. 159, 163 (1923). Thus, it has been said:

> The Supreme Court is not, and never has been, primarily concerned with the corrections of errors in lower courts decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case.

> The debates in the constitutional convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights & uniformity of judgmts." The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen amongst lower courts, to pass upon questions of wide import under the constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

Address of Chief Justice Vinson before American Bar Association, September 7, 1949, 69 S.Ct. V.VI. as reprinted in R. Stern and E. Gressman, *Supreme Court Practice,* 5th Ed. 1978 (Bureau of National Affairs, Inc.) at pp. 258-259. It is clear then that, if Petitioner seeks only review of the factual findings below, his Writ should be denied absent an exceptional showing of error. *Fortner Enterprises, Inc. v. U.S. Steel Corp.,* 394 U.S. 495 (1969). Upon examination the Petitioner's first argument, though put forth as if on a legal issue, is beyond question that he seeks review of the lower court's findings of fact. That is, while the Petitioner's argument assumes (without support in the record) a finding that Respondent's exercise of his First Amendment rights was in derogation of a neutral public employment regulation; in fact, the findings of the District Court as affirmed on

appeal were that Petitioner intentionally sought to deprive Respondent of his right to free speech through the subterfuge of restricting him to his office.

> It is the conclusion of this Court that the Plaintiff was terminated because he planned to address the Commissioners' Court on homosexual rights. Time restrictions were imposed on the Plaintiff for the first time when he informed [Petitioner] of his intentions. These time restrictions were obviously aimed at preventing the Plaintiff from making his public speech. To contend that the Plaintiff was fired solely for his refusal to comply with such hours is unrealistic. Had the Plaintiff requested time off from such hours to tend to personal affairs, it is doubtless that he would have obtained it. The abrupt imposition of strict working hours on a professional cannot be used as a weapon from preventing him from exercising his First Amendment rights.

District Court's March 20, 1978 Memorandum and Order (unpublished) reproduced as Appendix A of the Petition for Writ of Certiorari at pp. A-5, A-6.

In the body of his argument Petitioner forthrightly acknowledges that his complaint is solely directed to the District Court's findings. In light of the subsequent affirmance by the Fifth Circuit (*Van Ooteghem*, 628 F.2d at 492), such an argument does not rise to the level appropriate for the exercise of this Court's certiorari jurisdiction. The question here is similar to the question in *Berenyi v. District Director, Imm. and Nat. Serv.*, 385 U.S. 630 (1967) where this Court held that:

> The Petitioner asks us to reject as "clearly erroneous" the factual conclusion . . . reached by the Dis-

> trict Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (citations omitted).

Berenyi, 385 U.S. at 635. No obvious or exceptional showing of error having been made, the Petitioner's application should be denied.

(B) Petitioner Seeks to Shift the Burden of Proof

The argument is advanced by the Petitioner that Respondent did not meet his burden of proof at the trial level in that he offered no proof to substantiate his claim that his constitutional rights were violated. Petitioner is attempting to shift the burden of proof as set out in *Mt. Healthy City School District v. Doyle,* 429 U.S. 374 (1977) by ignoring the findings of the lower courts.

Mt. Healthy requires that a proponent show his conduct was constitutionally protected and then further establish that this conduct was a "substantial" or "motivating" factor in his employer's decision to terminate him. Once satisfied, it becomes the employer's burden to demonstrate by a preponderance of the evidence that he would have dismissed the proponent even in the absence of the protected conduct. *Mt. Healthy, supra* at 287. Petitioner had the benefit of the guidance of the *Mt Healthy* decision at trial, but wholly failed to go forward with his burden of proof.

Both the District Court and the Circuit Court analyzed the evidence in light of *Mt. Healthy,* and found without

question that Respondent did present sufficient evidence to substantiate his claim that his action was constitutionally protected and that it was a substantial factor in his dismissal. Moreover, both courts found the record to be totally devoid of any collateral justification for Respondent's discharge. District Court's March 20, Memorandum and Order (unpublished) reproduced as Appendix A of the Petitioner's Writ of Certiorari at pp. A-4 and A-5; *Van Ooteghem v. Gray,* 628 F.2d, at 493.

Even in light of these rulings Petitioner seems to argue that Respondent should have gone further in his proof, anticipating defenses which were not raised at the trial level, or anticipating all possible defenses, requiring Respondent to bear a burden of proof—of beyond all doubt. Petitioner's desire to increase Respondent's burden has no merit in light of *Mt. Healthy* and *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979).

II.

THE COUNTY IS LIABLE FOR ACTIONS OF POLICY MAKING OFFICIAL

At first examination Petitioner's second argument appears more substantial than his first. However, upon reflection it quickly becomes obvious that his assertions are foreclosed by earlier holdings of this Court. In capsule the Petitioner asserts that the County may not be held to answer in money damages where the elected, chief executive officer of a county agency is found liable in his official capacity. This argument was presented and dismissed by both courts below and does not provide the basis for plenary review here.

(A) Official Capacity Allegation is Suit Against County

The Petitioner asserts that Harris County was denied due process because it was not "sued" (i.e., named as a formal party in the pleading). This issue is obviously without merit.

> Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent . . . our holding today that local governments can be sued under § 1983 necessarily decides that local government officials are "persons" under § 1983 in those cases in which, as here, a local government would be sueable in its own name.

Monell v. Dept. of Social Services of City of New York, 436 U.S. 658, 690 n.55 (1978); *see generally Martinez v. State of California,* ____U.S.____, 100 S.Ct. 553, 558-9 (1980). *Monell* affirms that a government agent, sued in his "official capacity", is but a nominal defendant for the real party at interest. That real party at interest is the governmental entity to which the agent is responsible. This fact is graphically demonstrated by the judicial history of *Muzquiz v. City of San Antonio,* 520 F.2d 993 (5th Cir. 1975); rev'd on rehearing *en banc* 528 F.2d 499 (5th Cir. 1976); vacated 438 U.S. 901 (1978); on remand 586 F.2d 529 (5th Cir. 1978). There, a panel of the Fifth Circuit initially held that the trustees of the policemen's and firemen's pension fund were "persons" within the meaning of 42 U.S.C. § 1983. On rehearing *en banc,* the full Court found that federal courts did not have jurisdiction over individual members of such a Board of Trustees. This Court subsequently vacated the

en banc judgment and remanded the cause to the Circuit for "further consideration in light of *Monell*". On remand the Circuit found the Board amenable to suit under § 1983 and, by necessary implication, that the real party at interest remained the governmental entity.

Likewise, in *Quern v. Jordan*, ____U.S.____, 99 S.Ct. 1139, 1147 n.17 (1979) the status of a suit brought in a state officer's official capacity was analyzed in relationship to Eleventh Amendment immunity. The *Quern* court held that such an official capacity suit was a suit against the entity itself.

Thus, it is clear that by instituting this action against the Treasurer in his official capacity the County was fully on notice of its potential liability herein.

(B) No Vestiges of Immunity Exist

Likewise, the Petitioner complains that the governmental entity should not be made to answer for the illegal termination of the Respondent because of the immunities previously supposed to be afforded under the now discredited "person" requirement of *Monroe v. Pape*, 365 U.S. 167 (1961).

In essence this is a retroactivity[1] argument addressed to the *Monell* holding. It must fail.

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1. The term retroactivity may be misleading in this context. No new cause of action or legal right is created in *Monell*. Rather, *Monell* merely removes a supposed immunity to prosecution of a demonstrable wrong perpetrated by the governmental defendant. Thus, issues such as those raised in *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 n.15 (1974) are not implicated. The question is not whether the governmental entity has acted wrongly, the question is simply whether that entity should be allowed to continue asserting a defense from liability which has been found not to be authorized by statute or case law.

In *Monell* this Court left no doubt that the governmental entity's belief that it was shielded from liability by the *Monroe v. Pape* holding did not preclude liability.

> [M]unicipalities can assert no reliance claim which can support an absolute immunity. As Mr. Justice Frank Burger said in *Monroe*, "this is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decisions." 365 U.S. at 221-222, 81 S.Ct., at 503 (dissenting in part). Indeed, municipalities simply cannot "arrange their affairs" on the assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement. And it scarcely need be mentioned that nothing in *Monroe* encourages municipalities to violate constitutional rights or ever suggests that such violations are anything other than completely wrong.

Monell, 436 U.S., at 699-700.

Even if the Petitioner could rely on the *Monroe* immunity prior to the rendering of the *Monell* decision it would give him no comfort here. At least since *Ex parte Young*, 209 U.S. 123 (1908) it has been understood that a suit against an official in his official capacity might render the institution liable for certain remedial sanctions. Only recently this Court has affirmed that a prevailing Plaintiff is entitled to relief as against the State when a state official is sued in his official capacity. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); and *Milliken v. Bradley*, 433 U.S. 267, 290 (1967). Likewise, the diverse reasoning of the various opinions handed down in *Muzquiz v. City of San Antonio, supra*, amply demonstrate that the governmental entity relied on its supposed immunity only at its own peril. The issue was obviously

open to debate and if the entity chose to neglect the defense of its treasurer in the District Court it should not now be heard to complain.[2]

Nor would such a complaint be fruitful. As established in *Owen v. City of Independence, Mo.*, ____U.S.____, 100 S.Ct. 1398 (1980) a governmental entity is entitled to no immunity distinct from its agents. In fact, such an entity has significantly broader liability than its officials.

> [T]here is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify [a] qualified immunity. . . . We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983. [footnote omitted.]

Owen, 100 S.Ct., at 1409.

The County, having suffered nothing by the prosecution of this action against the Treasurer in his official capacity, is justly responsible for the remedial undertakings required by the District Court.

(C) Dual Representation Precludes Individual Liability

Harris County, from the very inception of this matter, has responded as though this suit was brought against the County itself. The Treasurer, in both his official and individual capacity, was represented by the County At-

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2. As is more fully developed *infra* the defense of the Treasurer was conducted completely by the County Attorney's Office through the time that the District Court held that Van Ooteghem had been wrongfully discharged. Thus, it cannot be said that the County was a stranger to this litigation or somehow was not on notice of its potential liability.

torney. Such representation is, in fact, required by statute[3] whenever "the suit involves any act of the official or [governmental] employee while in the performance of public duties." Vernon's Texas Civil Statutes, art. 332(c). Therefore, even if the County had been actually named, it could not have been more actively involved in this matter. The County, through its own counsel, directed every substantive and tactical decision made. The very same attorney who seeks to shift liability to the personal stake of the Treasurer represented the Treasurer in both his individual and official capacity at the trial level. As this Court said in *Hutto v. Finney*, 437 U.S. 678 (1978), a case involving the award of attorneys' fees:

> We do not understand the Attorney General [of Arkansas] to urge that the [liability] should have been awarded against the officers personally; that

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3. The statute in its entirety reads as follows:

Representation of County Officials and Employees by District, County or Private Attorneys

Section 1. In this Act, "nonpolitical entities" means any person, firm, corporation, association, or other private entity, and does not include the State, a political subdivision of the State, a city, a special district, or other public entity.

Section 2. In any suit instituted by a nonpolitical entity against an official or an employee of a county, the District Attorney of the District in which the County is situated or the County Attorney, or both, shall, subject to the provisions contained in Section 3, represent the official or employee of the County if the suit involves any act of the official or employee while in the performance of public duties.

Section 3. If additional counsel is necessary or proper for an official or an employee provided legal counsel by Section 2 of this Act, or if it reasonably appears that the act complained of may form the basis for the filing of a criminal charge against the official or employee, the County Commissioners' Court shall employ and pay private counsel.

Section 4. Nothing in this Act requires a County official or employee to accept the legal counsel provided for him in this Act.

> would be a remarkable way to treat individuals who have relied on the Attorney General to represent their interest throughout this litigation.

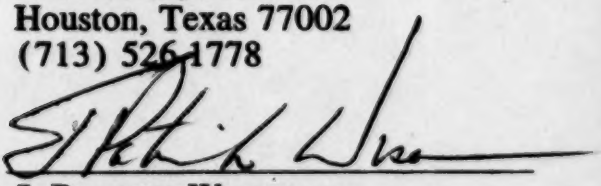
Hutto, 437 U.S., at 692 n.19. Paraphrasing *Hutto* the County Attorney is hardly in a position to argue that the award should be borne not by the County, but by the Treasurer individually after the Treasurer has relied on the County Attorney's Office to protect his interest throughout the District Court's resolution of this matter. *See Hutto*, 437 U.S., at 699 n.32.

CONCLUSION

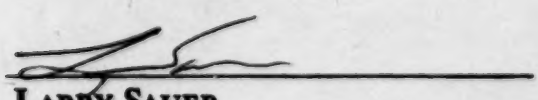
For each of these reasons Respondent suggests that the Petition for Writ of Certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Respondent's Brief in Opposition have been furnished to Billy E. Lee, Assistant County Attorney, 634 Harris County Administration Building, Houston, Texas 77002, by certified mail, return receipt requested, on this the 16th day of February, 1981.

J. PATRICK WISEMAN